

MALAYAN BANKING BHD.

v.

ONG KEE CHONG MOTORS SDN. BHD.

HIGH COURT MALAYA, MUAR
RICHARD TALALLA JC
[CIVIL APPEAL NO. 11-13 OF 1989]
2 SEPTEMBER 1990

BANKING: *Cheques debited into wrong account - Marked not negotiable - Whether bank ascertained identity of account holder - Negligence - Duty of care - Question of ownership of cheques - Obligations of drawers of cheque - Onus of proof - Sections 21, 21(2) of the Bills of Exchange Act 1949.*

The plaintiff/respondents O were the customers of the appellant bank MBB and maintained an account at the appellant's branch at Segamat, Johor. On 30 August 1980 O drew 2 cheques in the name of one Y totalling RM14,840.80. The 2 cheques were marked 'not negotiable' and were to be credited into Y's account. MBB however credited the said amount into the account of one T as a result of which O's account was debited. O pleaded that MBB had done so without O's authority and in the alternative that MBB had negligently, without exercising proper care, credited the account of T.

The learned Sessions Court Judge found for and gave judgment to O in the sum of RM14,840.80. MBB appealed. The issues on appeal were whether the respondent was the true owner of the cheque and whether the appellant was negligent.

Held:

[1] There is no requirement on O's part to plead that it was the true owner of the cheques - O. 18 r. 8(1) of the Rules of the High Court 1980 (RHC). Since MBB was wanting on all 3 counts stated in r. 8(1) it was accordingly disqualified from raising the issue of ownership of the cheques at the trial.

[2] Based on the pleadings and the evidence, O had sufficiently established that it was the true owner of the cheques as it was O who in the first place had possession of the cheques and it was O who drew them; there was no evidence of O delivering them to anybody, posting them or parting with their possession.

[3] (a) Under s. 85 of the Bills of Exchange Act 1949 (the Act), MBB bore the *onus* of proving that it had acted without negligence.

(b) MBB was required to exercise the same care and forethought with regard to the cheques paid in by the customer as a reasonable man would bring to bear on similar business of his own and to provide a reasonable and competent staff to carry out this duty.

(c) On the evidence, MBB did not discharge this *onus*.

[4] There was no evidence that T was a holder in due course; accordingly the presumption under s. 21(2) of the Act does not arise. In addition, for the presumption under s. 21(3) to apply, it is necessary for MBB to establish *prima facie* that T was in lawful possession of the cheques. It was MBB's duty to explain how T came to be in possession of the cheques and this MBB had failed to do.

- a** [5] MBB only raised the issue of true ownership of the cheques in his final submission; in an action for conversion, the plaintiff's property in the goods, if disputed, must be specifically denied. A general denial of the plaintiff's property in the goods puts in issue the title of the plaintiff. Therefore, it was incumbent on MBB to plead that it acquired the cheques from T who was the true owner or had a valid and proper authority to negotiate them in the way he did.
- b** [6] The Court takes a dim view of a party communicating with it without reference to the other side; it is the duty of Counsel to draw to the attention of the Court all relevant authorities within Counsel's knowledge, notwithstanding whether such authorities are in support of or against the cause.
- [Appeal dismissed.]
- c** **Cases referred to:**
Read v. Brown [1888] 22 QBD 128
Cooke v. Gill [1873] LR 8 CP 107
Letang v. Cooper [1965] 1 QB 222
The Rubber Industry (Replanting) Board v. Hongkong and Shanghai Banking Corporation [1957] MLJ 103
- d** *Ladbroke and Co. v. Todd* [1913-4] 30 TLR 433
Matthews v. Brown and Co. [1893-4] 10 TLR 386
Midland Bank Ltd. v. Reckitt [1933] AC 1
Oriental Bank of Malaya v. Rubber Industry (Replanting) Board [1975] MLJ 153
United Malayan Banking Corp. Bhd. v. Kek Tek Huat (deceased) (Kik Chon Lam & Ors., executors of the estate of Kek Tek Huat) [1990] 1 CLJ (Rep) 301
Worshipful Company of Carpenters of the City of London v. British Mutual Banking Co. Ltd. [1937] All ER 811
- e** *King v. Milsom* 2 Camp 5 1062
C v. C [1973] 3 All ER 770
Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd. & Anor. [1975] AC 581
Superintendent of Pudu Prison & Ors. v. Sim Kie Chon [1986] CLJ (Rep) 256
- f** **Legislation referred to:**
 Bills of Exchange Act 1949, ss. 21, 85
 Rules of the High Court 1980, O. 18 rr. 8(1), O. 18 r. 19
- Other sources referred to:**
Banking Law Leading Indian Cases (2nd Edn.) by M.S. Parthasarathy
Bullen and Leake and Jacob's Precedents of Pleadings (12th Edn.)
Shorter Oxford English Dictionary, 3rd Edn.
- g** *For the appellant - C.C. Aiyathurai; M/s. C.C. Aiyathurai & Co.*
For the respondent - Retnam; M/s. Retnam & Co.

JUDGMENT

Richard Talalla JC:

- h** In its statement of claim the plaintiff, the respondent in this appeal, pleaded that it was the customer of the appellant, the defendant in the original action, and maintained an account of the appellant's branch of Segamat, Johor, that on 30 August 1989 the respondent draw 2 cheques in the name of one Yong Kuan Tian (Yong) for RM40 and RM14,800 dated 30 August 1980, that the 2 cheques were specifically marked by the respondent "not negotiable" and were meant thereby to be credited to the account of Yong Kuan Tian and no one else, that
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without any authority the appellant credited the same into the account of one Tay Sze Hwa (Tay) and without the authority of the respondent debited the account of the respondent with the amount of RM14,840.80. The respondent pleaded in the alternative that the appellant without exercising proper care negligently paid the said amount of RM14,840 into the account of Tay. The particulars of negligence pleaded were failure to ascertain the true and proper identity of Tay and Yong and failure to ascertain the proper title to the cheque by Tay. The respondent claimed repayment of the sum of RM14,840 and other relief.

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The appellant in its defence admitted that the 2 cheques bore the words “not negotiable” but said that they were “payable to order endorsed on them”. The appellant denied that the cheques were to be credited to the account of Yong and no one else and indeed the rest of the respondent’s claim save the allegation that the sum of RM14,840.80 was credited to the account of Tay being the total sum payable under the 2 cheques. At the trial the appellant’s defence was amended to the effect that the appellant denied that it owed a duty of care to the respondent in the circumstances of the case and negligence on the appellant’s part.

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The respondent’s managing director gave evidence to the effect that on 30 August 1980 his company issued 2 cheques in the name of Yong Kuan Tian, that Yong sold a car to the respondent company, that the 2 cheques were in payment of the car, that the cheques were marked “not negotiable”, crossed and the words “bearer/pembawa” cancelled, that by these markings he meant that those cheques were solely for Yong’s use and no one else, that the amount could not be credited into anybody else’s name, that one cheque was held in an account maintained by the appellant and the other cheque in an account maintained by Public Bank Malacca, that the cheques were used by Tay and the credit balance at both banks was less, that the appellant was asked why the cheques were paid to Tay instead of Yong but there was no reply. The managing director claimed that the appellant had not acted properly but negligently, that the appellant did not ensure that the cheques were solely for Yong’s use, that he expected the appellant to find out the proper identity of Tay and Yong and that the appellant negligently failed to find out the identity of both these persons and that the respondent’s account was wrongly debited. In cross-examination he maintained that the appellant was negligent and testified that he knew for a fact that the cheques were not endorsed and that he knew this because he went to the police station and found out that the identity card number on both cheques belonged to an Indian man.

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An officer at the appellant’s Segamat branch gave evidence. He said that the endorsee Tay Sze Hwa was a customer of the appellant at the material time and the appellant had all the relevant particulars of him. This witness said that one Mr. Yeo See Hock was the officer who was responsible for both the cheques but he was not in Court that day. Neither Mr. Yeo nor any other person was called to give evidence and there the case for the defence rested.

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The ownership of the cheques was not raised in the pleadings. There is no reference to it in the defence. Counsel for the respondent made no reference to the matter in his written submission in the Court below. Counsel for the appellant in his answering submission did so but only in a cursory manner thus:

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The plaintiff does not claim to be the true owner of the cheque only the drawer of the cheques nor does the plaintiff claim that there is anything in the cheques that vitiate the validity of the mandate given to the banks to pay Yong Kuan Tian the payee and to debit the account of the payee. The true owner of the cheque is therefore Yong Kuan Tian. Having parted possession of the cheque by delivery and acknowledging that it is for valuable consideration the Banks in honouring the cheques owe no duty of care to the plaintiff.

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a The learned Sessions Court Judge found for and gave judgment to the respondent to the sum of RM14,840. The learned Judge gave grounds for her judgment. It is not surprising she made no reference to ownership of the cheques. It did not seem to be a proper issue before her.

b The appellant appealed. Counsel for the appellant at the outset clarified the facts. He said the cheque for RM40 was drawn by the respondent on the appellant and negotiated direct with the paying bank which was of course the appellant whereas the cheque for RM14,800 was drawn by the respondent on the Public Bank, Malacca and negotiated through the respondent who acted as the collecting bank. Counsel confirmed that both cheques were crossed "Not Negotiable" and the word "bearer" thereon was cancelled in each case.

c There was a number of grounds of appeal but Counsel for the appellant confined himself to only two namely that the respondent was not the true owner of the cheques and that the appellant was not negligent.

In regard to the first ground it was submitted that the respondent did not plead that it was the true owner of the cheques. With respect I do not see that there was any requirement on the part of the respondent so to plead. Order 18 r. 8(1) of the Rules of our Court is as follows:

d A party must in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, any relevant statute of limitation, fraud or any fact showing illegality:

(a) which he alleges makes any claim or defence of the opposite party not maintainable; or

(b) which, if not specifically pleaded, might take the opposite party by surprise; or

e (c) which raises issues of fact not arising out of the preceding pleading.

f Inasmuch as it was the case for the appellant that the respondent was not the true owner of the cheques it was a specific matter which was going to render the respondent's claim not maintainable. Having not been pleaded it would certainly have taken the opposite party by surprise. Certainly it was not an issue of fact arising out of the statement of claim. It had to follow that the appellant was wanting on all the 3 counts stated in r. 8(1) and accordingly disqualified itself from raising the issue of ownership of the cheques at the trial.

g Then it was argued that there was no evidence that the respondent was such an owner. I do not agree. The respondent's statement of claim seemed to disclose a cause of action. The words "cause of action" comprise every fact (though not every piece of evidence) which it would be necessary for the plaintiff to prove, if traversed, to support his right to the judgment of the Court (see *Read v. Brown* [1888] 22 QBD 128 per Lord Esher MR p. 131). The phrase comprises every fact which is material to be proved to enable the plaintiff to succeed (see *Cooke v. Gill* [1873] LR 8 CP 107 per Brett J p. 108). The words have been defined as meaning "simply a factual situation the existence of which entitles one person to obtain from the Court a remedy against another person" per Diplock LJ in *Letang v. Cooper* [1965] 1 QB 222 p. 242.

h In *The Rubber Industry (Replanting) Board v. Hongkong and Shanghai Banking Corporation* [1957] MLJ 103 the plaintiff board drew a cheque in favour of one Toh Whye Teck. The cheque was crossed and marked "Account Payee Only" and dispatched in the usual course of business but in some way unknown to either the plaintiff or the defendant the cheque came into the possession of some unauthorised person resulting in it being credited into an account other than that of the payee. The plaintiff was not aware of the circumstances under which the cheque was taken except that the cheque was prepared for

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posting in the usual way but did not reach the addressee. The defendant bank did not plead that the dispatch of the cheque amounted to payment. Buhagiar J held that under those circumstances there was not delivery of the cheque and the plaintiff remained the true owner. The learned Judge referred to other cases where in similar circumstances as to despatch an action was successfully maintained by the drawer of the cheque, for example *Ladbroke And Co. v. Todd* [1913-4] 30 TLR 433 and *Matthews v. Brown And Co.* [1893-4] 10 TLR 386. The learned Judge went on to say that possession of the cheque remained in the plaintiff who until presentation could have stopped its payment and he cited the example used by Lord Atkin in *Midland Bank Ltd. v. Reckitt* [1933] AC 1 at p. 14 where if it could be supposed that the plaintiff found the unauthorised person standing at the counter of the Bank waiting to pay in the cheque the plaintiff could have demanded the immediate delivery of the cheques to himself.

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Likewise the case of *Oriental Bank of Malaya v. Rubber Industry (Replanting) Board* [1975] MLJ 151. In the Supreme Court case of *United Malayan Banking Corp. Bhd. v. Kek Tek Huat (deceased) (Kik Chon Lam & Ors. executors of the estate of Kek Tek Huat)* [1990] 1 CLJ (Rep) 301 Gunn Chit Tuan SCJ delivering the unanimous judgment of the Court drew notice to the two decisions above stated and said:

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it was held by the Court that the drawer of the cheques concerned, namely, the Rubber Industry (Replanting Board), remained the true owner of the cheques and was entitled to maintain the action for conversion of the cheques. The Court was not concerned in both cases with the question whether the payee of the cheques was the true owner and could maintain an action for conversion.

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Whether the drawer of the cheque is the true owner thereof or not depends upon the facts of each case. So submitted Counsel, citing from *Banking Law Leading Indian Cases* (2nd Edn.) by M.S. Parthasarathy in the Supreme Court case above said at p. 305 where Gunn Chit Tuan J made reference by the submission giving no indication that he did not agree with it.

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The view I take, based on the pleadings and the evidence adduced in this case, as set out above, is that the respondent had sufficiently established that it was the true owner of the cheques. It was the respondent who in the first place had possession of the cheques. It was the respondent who drew them. There was no evidence of the respondent delivering them to anybody, posting them or parting with their possession. The respondent could in the circumstances of Lord Atkin's example above stated, stopped payment.

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Reverting to the written submission made at the trial on behalf of the appellant, as to the first sentence thereof, I do not in the circumstances of this case see that there was any obligation on the part of the respondent to do the things that Counsel says the respondent did not do. The second sentence, with respect, would appear to be a non sequitur. As to the last sentence there was no basis, evidentiary or otherwise, for the statement that the respondent parted with possession of the cheque by delivery or at all.

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In the circumstances it is clear to me that the respondent must be taken to be the owner of the cheques.

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As to the ground that the appellant was not negligent, the respondent's pleadings and the evidence adduced on its behalf were clear. The appellant simply failed to ascertain the true and proper identity of the payee and Tay's title to the cheques. By reference to s. 85 of the Bills of Exchange Act 1949 the appellant bore the *onus* of proving that it had acted without negligence. The appellant was required to exercise the same care and forethought with regard

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- a** in the cheques paid in by the customer as a reasonable man would bring to bear on similar business of his own and to provide a reasonable and competent staff to carry out this duty. See the judgment of Buhagiar J at pp. 105 and 106 of *The Rubber Industry (Replanting Board)* case above stated. The appellant did not discharge that *onus*. It led no evidence relevant to its duty of care in the circumstances. It called only one witness, the officer from its Segamat branch, who joined the appellant on 1 April 1982, long after the event. Naturally he confirmed
- b** that he was not the person who cleared the cheques. He testified that he was a credit officer and not familiar with clearing cheques. He was asked the following question:

If I give a cheque in name of A who passes to "B" who then tenders to the Bank what enquiries would you make?

He replied:

- c** I am not in a position to answer.

This witness said that Mr. Yeo See Hock was the officer responsible for both the cheques but that he was not present there in Court.

- d** Such being the situation I am of the view that the learned Sessions Court Judge, who dealt with the issue of negligence thoroughly, was right in finding that the appellant had failed to discharge the *onus* of establishing that it had acted in this case without negligence.

At this stage Counsel for the appellant sought an opportunity to argue further the question of *onus* of proof of ownership of the cheque. As the point had not been raised before in these proceedings I acceded to Counsel's request and adjourned the matter so as to enable Counsel on both sides to research and argue the point.

- e** At the resumed hearing Counsel for the appellant referred to s. 21 of the Bills of Exchange Act 1949 which is as follows:

21. (1) Every contract on a bill, whether it be the drawer's, the acceptor's, or an indorser's, is incomplete and revocable, until delivery of the instrument in order to give effect thereto:

- f** Provided that where an acceptance is written on a bill, and the drawee gives notice to or according to the directions of the person entitled to the bill that he has accepted it, the acceptance then becomes complete and irrevocable.

(2) As between immediate parties and as regards a remote party other than a holder in due course, the delivery:

- g** (a) in order to be effectual must be made either by or under the authority of the party drawing, accepting or indorsing as the case may be;
- (b) may be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the bill.

But if the bill be in the hands of a holder in due course, a valid delivery of the bill by all parties prior to him so as to make them liable to him is conclusively presumed.

- h** (3) Where a bill is no longer in the possession of a party who has signed it as drawer, acceptor, or indorser, a valid and unconditional delivery by him is presumed until the contrary is proved.

- i** Other than what was said in evidence in regard to the cheques being issued, there was not one whit of evidence pointing to the plaintiff having delivered the cheques to anyone. There was no evidence that Tay was a holder in due course of the cheques and accordingly the presumption provided in s. 21(2) does not arise.

Counsel for the appellant then argued that possession of the cheques was undisputedly in the hands of Tay by reason of the fact that it was he who presented them at the bank for payment and therefore by reference to subsection (3) of s. 21 delivery by the respondent had to be presumed until the contrary was proved and it had to follow that the *onus* was on the respondent to establish that there was no delivery. I do not agree. The argument runs foul of the decisions in *The Rubber Industry (Replanting Board)* cases above stated. As I see it, the respondent as drawer of the cheques was the true owner thereof and in the absence of anything else, and affectively there was nothing else, the appellant was guilty of conversion. See also the dictum of Greer LJ, albeit obiter, in *Worshipful Company of Carpenters of The City of London v. British Mutual Banking Co. Ltd.* [1937] All ER 811 at p. 817. For the presumption under subsection (3) to arise in this case it was necessary for the appellant to establish *prima facie* that Tay was in lawful possession of the cheques; for example that he was authorised by the drawer or payee to negotiate the cheques. The appellant did not do so.

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In evidence PW1 stated that he issued the cheques. He was not questioned at all as to what he meant by that. He was not asked for instance whether in using the word “issued” he was giving that word its ordinary meaning or its statutory meaning. In s. 2 of the Act “issue” is stated to mean the first delivery of a bill or note, complete in form, to a person who takes it as a holder. In truth it would appear that the statutory meaning of that word was far from the respective minds of anyone until near conclusion of argument in this appeal and neither Counsel touched on the evidence of PW1 in this regard. It had to follow that the witness must be taken to have used the word in its ordinary sense. In the Shorter Oxford English Dictionary, 3rd Edn. revised with addenda, the verb “issue” is stated to mean *inter alia*, and I use the meaning best suited to the instant case, to give or send out authoritatively or officially. That then is what PW1 must be taken to have done. Who he gave or sent the cheques out to is not in evidence and it had to follow that there was no evidence that the taker of the cheques from PW1 was Tay. In s. 2 of the Act holder means the payee of indorsee of a bill or note who is in possession of it, or the bearer thereof. There was no evidence of delivery of the cheques to Yong or that he was in possession of it. There was no evidence that Tay was the indorsee of the cheques. The cheques of course were not made out to bearer. Therefore it fell on the appellant to explain how Tay came to be in possession of the cheques and this the appellant failed to do either in its pleadings or by evidence.

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Counsel for the appellant was specifically asked why the issue of the true ownership of the cheques was raised only in his final submission and whether it was a tactical move on his part. Counsel answered that it was for the plaintiff to establish his cause of action either in his pleadings or by evidence with a subsequent application to amend the pleadings. Counsel was then asked whether it would not have been the proper course if he thought the plaintiff did not in its statement of claim disclose a cause of action for the appellant to proceed under O. 18 r. 19 of the Rules of the High Court 1980 and apply for an order that the statement of claim be struck out on the grounds that it did not disclose a cause of action or was frivolous or vexatious or embarrassing or an abuse of the process of the Court and thus save the Court’s time or alternatively in the interest of justice have the pleadings amended so that the true and real issues would properly be before the Court rather than adopt a tactical move. To this there was no reply.

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It would seem that the forensic strategy, structured on a belief that the respondents had to establish something more than simply pleading and proving that it was the drawer of the cheques, was to hold the respondent in blissful ignorance, then with the evidence in hand

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a and the respective cases for the parties closed to spring on the respondent its failure to establish its true ownership of the cheques. To my mind this is an undesirable practice. It is stated at the beginning of the first chapter in *Bullen and Leake and Jacob's Precedents of Pleadings* 12th Edn., as follows:

b The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the Court will be called upon to adjudicate between them.

In the same textbook at p. 1022 it is stated that in an action for conversion the plaintiff's property in the goods, if disputed, must be specifically denied and that a general denial of the plaintiff's property in the goods merely puts in issue the title of the plaintiff. It is stated further in that work that it is not a sufficient or proper plea to entitle the defendant to raise a positive case such as that the goods were acquired by the defendant by purchase or gift or otherwise from the true owner. Thus it was incumbent on the appellant to plead that it acquired the cheques from Tay who was the true owner or had a valid and proper authority to negotiate them in the way he did.

c One working day before the date set down for final delivery of this judgment a letter was received by the Registrar of this Court from the solicitors for the appellant enclosing a report of the case of *King v. Milsom* 2 CAMP. 5 1062. The solicitors did not bring this case to the notice of the respondent or its representative. Instead it was the Court which, immediately upon notice of the same, gave notice of it by telephone to Counsel for the respondent. When Counsel for the appellant subsequently appeared before me to hear the extended judgment he was asked why the respondent was not informed of this latest authority and whether the failure to do so did not conflict with our adversary system and the *audi-alteram partem* rule to which he agreed that he could have extended a copy of the same "out of courtesy" but that it was rather late and it was a difficult case to get and that he had to obtain it from a leading firm of solicitors. To my mind it was not just a matter of courtesy. Whilst this Court is appreciative of all relevant case law being brought to its attention, preferably in the due course of hearing but in any event no matter how late in the proceedings, it takes a dim view of a party communicating with it without reference to the other side. Such conduct on the part of solicitors and Counsel is unacceptable. In fact I will go further. It is the duty of Counsel to draw to the attention of the Court all relevant authorities within Counsel's knowledge, whether such authorities are in support of or against his cause. In this instance it was a simple matter of telephoning the respondent's solicitors and informing them of the precedent, as the Court eventually and with no apparent difficulty did.

d Turning to *King v. Milsom*, it is noted that there the plaintiff lost a 50 pound Bank of England note from his pocket in the streets. The note found itself in the possession of the defendant. It would appear that the note was negotiable. Lord Ellenborough in holding that in the case of negotiable instruments possession is *prima facie* evidence of property found himself bound to presume that the defendant, when possessed of the note, was a *bona fide* holder for a valuable consideration. The learned Judge went on to state that it would greatly impair the credit and impede the circulation of negotiable instruments, if persons holding them could, without strong evidence of fraud, be compelled by any prior holder to disclose the manner in which they received them. It thereupon nonsuited the plaintiff in his claim in trover for the note. To my mind *King v. Milsom* is quite clearly distinguishable on the facts from the present case. That case concerned a negotiable instrument whereas in the present case the cheques were not negotiable.

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If the appellant considered that the respondent's statement of claim disclosed no reasonable cause of action an early application should have been made under O. 18 r. 19 whereupon the question of *onus* would at that stage have been thrashed out and the pleadings put on a proper footing. The appellant could then have interrogated the respondent on the issue in question apart from seeking to establish its case on evidence adduced at the trial. None of these steps was taken. Instead the appellant ventured into trial by ambush only to have the fire returned, and fatally at that.

As was so aptly put by Latey J in *C v. C* [1973] 3 All ER 770, with respect I quote from p. 773:

Perhaps one may be allowed to venture the belief that the strong trend in recent years both in the rules of Court and the Courts' control of their own practice has been to eliminate or reduce the scope of technical and tactical manoeuvre and encourage litigants to put their cards on the table, so defining the real issues and saving costs and delay.

All the more is that the case in this day and age when the cost of litigation is so prohibitive, judicial time so greatly demanded and the net representing the principle of *res judicata* so widely cast. In the last instance see the case of *Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd. & Anor.* [1975] AC 581 and the judgment of Abdoolcader SCJ in *Superintendent of Pudu Prison & Ors. v. Sim Kie Chon* [1986] CLJ (Rep) 256.

The appeal is dismissed with costs.

Also found at [1991] 1 CLJ 363

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